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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| Implementation of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-259 |
| Broadcast Signal Carriage Issues | ) | |
| Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates | ) | MM Docket No. 90-4 |
| Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market | ) | MM Docket No. 92-295 RM-8016 |

To: The Commission

## PETITION FOR RECONSIDERATION

Outlet Broadcasting, Inc. ("OBI"), licensee of WCMH(TV), Columbus, Ohio, by its counsel and pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429 (1992), hereby seeks reconsideration of the Commission's recent decision in the above-referenced proceeding to change the designation of the Columbus, Ohio television market in Section 76.51 of the Commission's rules, 47 C.F.R. § 76.51 (1992), from "Columbus" to "Columbus-Chillicothe."[1] Because this action was taken without sufficient notice to interested parties and was consequently based on a patently inadequate record, OBI urges that it be reconsidered and reversed. If the Commission had provided statutorily sufficient notice, it would have been inundated with evidence demonstrating

[1] Report and Order (MM Docket Nos. 92-259 et al.), FCC 93-144, released March 29, 1993 ("Report and Order"), at paragraphs 48-50. This decision was published in the Federal Register on April 2, 1993, 58 Fed. Reg. 17,350.

that the Columbus and Chillicothe television markets are indeed separate and distinct and do not exhibit the "commonality" that the Report and Order states is necessary for such changes.[2] As

In the NPRM, the Commission explained that the Section 76.51 list, which was codified in 1972, had been based principally on Arbitron's 1970 list of prime time household rankings.[6] Since many television markets have changed since 1970, the NPRM requested comment on suitable criteria for revising the list. The NPRM set forth a number of general, industry-wide questions regarding the list for which the Commission requested answers.[7] The breadth of the questions indicated that the Commission was seeking comments on a comprehensive approach to revising Section 76.51. In a footnote to the NPRM, the Commission specifically indicated that, in the interim during the pendency of the MM Docket 92-259 rulemaking, particular or ad hoc revisions to the list would be made through "individual rulemaking notices" and cited one such pending inquiry.[8]

Indeed, after release of the NPRM, but before the January 4, 1993 deadline for submitting comments in MM Docket No. 92-259, the Commission issued two more separate notices proposing specific changes in Section 76.51's designations of the Atlanta, Georgia market and the Orlando-Daytona Beach-Melbourne-Cocoa,

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[6] NPRM, 7 FCC Rcd at 8060.

[7] For example, these general questions included

> Should we expand our list to include all markets? Should we provide an annual update of the top 100 markets? Should we establish procedures to amend the list periodically . . .? Alternatively, should we modify individual market designations in response to individual rulemaking petitions?

NPRM, 7 FCC Rcd at 8060.

[8] NPRM, 7 FCC Rcd at 8060 n. 27.

Florida market.[9] Both of these notices specified deadlines for the submission of initial and reply comments.

On March 29, 1993, the Commission issued its Report and Order in MM Docket No. 92-259. The document, which included ninety-nine closely typed pages, dealt with an enormous variety of issues and concerns necessary to implement the mandatory signal carriage and retransmission consent provisions of the 1992 Cable Act. On the specific subject of Section 76.51's "Top 100 Market List," the Commission reiterated that it had sought comment on industry-wide reform of the Section 76.51 list: "We had hoped that in response to the Notice commenters would provide us with a mechanism for revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market."[10] The Commission indicated that it had not received suggestions for such criteria and, based on the "generalized" comments before it, decided that a "major" overhaul of the Section 76.51 list, which would have "significant implications," was not mandated by the record.[11]

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[9] Notice of Proposed Rule Making (MM Docket No. 92-306), FCC 92-561, released December 31, 1992 (proposing to amend § 76.51 to add Clermont, Florida to Orlando-Daytona Beach-Melbourne-Cocoa, Florida television market); Notice of Proposed Rule Making (MM Docket No. 92-295), 7 FCC Rcd 8591 (1992) (proposing to amend § 76.51 to add Rome, Georgia to Atlanta, Georgia television market). Both of these NPRM's acknowledged the fact that revision of Section 76.51 was under consideration in this docket and noted that this proceeding was going forward "on a separate track." Notice (MM Docket No. 92-306), FCC 92-561 at 1 n. 5; Notice (MM Docket No. 92-295), 7 FCC Rcd at 8591 n. 2.

[10] Report and Order, at paragraph 49.

[11] Id. at paragraphs 49-50.

The Commission stated that it would consider future revisions to the list on an ad hoc basis using an expedited rulemaking procedure.[12] Under this approach, the Commission said it would issue a notice of proposed rulemaking based on a petition without first seeking comment on the petition itself. After reviewing the comments it received in response to such a notice, the Commission stated that it would add a new community to a market designation if the comments demonstrated "commonality between the proposed community to be added . . . and the market as a whole."[13]

In addition, despite the more general scope of the rule changes that had been discussed in the NPRM and the NPRM's footnote indicating that changes to specific markets would be considered in separate, individual proceedings, the Commission in the Report and Order acted to modify three particular markets listed in Section 76.51. The Commission changed the Atlanta, Georgia market to "Atlanta-Rome," it renamed the Columbus, Ohio market as "Columbus-Chillicothe," and it added New London, Connecticut to the Hartford-New Haven-New Britain-Waterbury, Connecticut market.[14]

Of the three changes, only the Atlanta modification had been the subject of a Notice of Proposed Rule Making in response to which the Commission had received comments from parties other

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[12] Id. at paragraph 50.

[13] Id.

[14] Id.

than the proponent of the change.[15] Even in that case, however, the Commission declined one commenter's additional request to include Athens, Georgia in the market name, explaining that the proposal had not been the subject of the NPRM in that particular docket. The Commission stated that it would consider the Athens request if the proponent petitioned to initiate a proceeding to consider the issue.[16]

By contrast, the addition of Chillicothe to the Columbus market designation change was made without any published notice or public indication from the Commission that it was contemplating the change. Without any such indication, the Commission understandably received no oppositions or comments on the idea. The only document in the record in MM Docket No. 92-259 concerning the Chillicothe modification was a two-page request for the change that was filed by the amendment's proponent, Triplett and Associates, Debtor-in-Possession ("Triplett"), licensee of WWAT(TV) in Chillicothe, Ohio. The two-page request incorporated by reference two earlier and, by then, very stale filings, one of which was almost five years old. (The other had been in the Commission's files for eighteen months.) In a very brief attachment, Triplett supplied an extremely minimal, "bare bones" update of a few of its earlier data. To the best that OBI can ascertain, the Commission had never issued a public notice concerning

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[15] In the Atlanta proceeding, five parties, including the proponent of the change, filed comments. Given its decision to change the Atlanta designation in this docket, the Commission added the Atlanta docket number to the caption in this case.

[16] Id. at paragraph 50 n. 149.

either of these earlier filings.[17] The Commission reported the filing of the two-page request in a public notice of comments received in this docket; however, the notice listed only the petitioner's name as one of many filers and gave absolutely no indication that the comments sought a change in designation of the Columbus market.[18]

Sufficient notice and description of a proposed change are statutory requisites of the Commission's process.[19] As judicial authorities have noted,

> The adequacy of notice is a critical starting point which affects the integrity of an administrative proceeding. Notice is said not only to improve the quality of rulemaking through exposure of a proposed rule to comment, but also to provide fairness to interested parties and to enhance judicial review by the development of a record through the commentary process.[20]

As demonstrated here, adequate notice is essential to generate debate and create a thorough record on which a Commission decision can be based. The NPRM in this case cannot be said to have given the parties notice that the Commission was consid-

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[17] The only public FCC reference to any earlier filings by Triplett concerning the Chillicothe change appears in an obscure footnote in a Further Notice of Proposed Rule Making in an entirely different docket that had been initiated in 1988. See Further Notice of Proposed Rule Making (Gen. Dkt. No. 87-24), 3 FCC Rcd 6171, 6176 n. 15 (1988).

[18] FCC Filings, Mimeo No. 31317, Jan. 15, 1993, at 1.

[19] 5 U.S.C. § 553(b)(3).

[20] National Black Media Coalition v. FCC, 791 F. 2d 1016, 1022 (D.C. Cir. 1986). In NBMC v. FCC, on facts similar to those in this case, the Court of Appeals for the Second Circuit found that the Commission had given notice but that it was "wholly inadequate

ering changes in particular markets. In fact, to the contrary, the NPRM said such specific changes would take place in separate proceedings and at least two such proceedings were initiated while the comment period in this docket was still open. Interested parties had no idea that the Commission was considering the addition of Chillicothe to the Columbus designation. As a result, it received no comments on the subject, and its decision was based on information and data in its files that was as much as five years old and that had never directly been addressed in comments from other parties. Faced with a similar lack of notice concerning the proposed Athens, Georgia change and a lack of comments exploring that subject, the Commission chose to defer taking action. There, the Commission had only the information submitted in January 1993 by the change's proponent. In the case of Chillicothe, the Commission had less -- a stale and unvetted record -- but took the action anyway.

The fact that the Chillicothe proponent took advantage of the Commission's announcement of its generalized review of Section 76.51 and resubmitted its old comments cannot be deemed in any way to satisfy the agency's obligation to provide satisfactory notice. Specific and adequate notice must come from the agency itself. In a similar context, the District Court of Appeals for the District of Columbia Circuit has stated,

> Neither can we properly attribute notice to the other appellants on the basis of an assumption that they would have monitored the submission of comments. "As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice nec-

essarily must come -- if at all -- from the agency."[21]

Comments from one interested party which noticed a nexus to a proposal it had previously made do not make up for the agency's failure to give sufficient notice.[22]

To comply with its statutory responsibilities and ensure that rule amendments are premised on a well-supported record, it is essential that the Commission remove the modification of the Columbus market from among the changes adopted in MM Docket 92-259 and issue a Notice of Proposed Rule Making to explore the question of adding Chillicothe to the Columbus market designation. Only with such action will the Commission act consistently with its statement in the NPRM in this docket that individual market revisions would be handled through separate proceedings and with its decision not to add Athens to the Atlanta market designation based on the fact that the change had not been the subject of a Notice of Proposed Rulemaking.

If the Commission had given adequate notice that it was contemplating adding Chillicothe to the Columbus designation, it would have received abundant evidence demonstrating that Chillicothe is indeed a separate and distinct market from Columbus and that there is a clear lack of commonality between them. Adequate notice also would have produced a record upon which to evaluate whether WWAT(TV)'s claimed dire financial

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[21] American Federation of Labor v. Donovan, 757 F. 2d 330, 340 (D.C. Cir. 1985) (citations omitted).

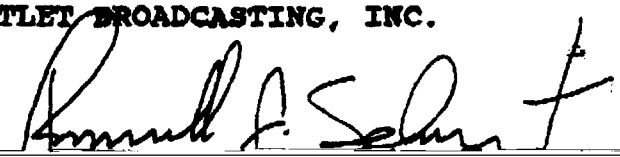
[22] "The fact that some knowledgeable manufacturers . . . responded, is not relevant. Others possibly not so knowledgeable also were interested persons within the meaning of 5 U.S.C. § 553." Wagner Electric Corp. v. Volpe, 466 F2d at 1019 (3d Cir. 1972).

straits are really the fault of Commission regulation rather than the licensee's own mismanagement and failure to program the station in a manner that appeals to even its home-community viewers.

Accordingly, Outlet Broadcasting, Inc. urges the Commission to reverse its decision to amend Section 76.51 of its rules to change the Columbus market designation from "Columbus" to "Columbus-Chillicothe" and requests that the Commission issue a Notice of Proposed Rule Making so that interested parties may comment and the proposal may be considered on a well-developed record.

Respectfully submitted,

OUTLET BROADCASTING, INC.

By 

## CERTIFICATE OF SERVICE

I, Diane Wilson, a secretary in the law offices of Horack, Talley, Pharr & Lowndes, hereby certify that true copies of the foregoing "Petition For for Reconsideration" were deposited in the U.S. mail, postage prepaid, addressed to the following this 3rd day of May, 1993:

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